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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ERIC CANTONA, et al.,

Plaintiffs,

v. 15 CV 3852 (RA)

NEW YORK COSMOS, LLC,

Defendant.

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New York, N.Y.
December 1, 2015
2:10 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

LAW OFFICE OF CORDERO, RICHARDSON, COMPO & ASSOCIATES
Attorneys for Plaintiff
BY: MICHAEL C. COMPO

GORDON & REES LLP
Attorneys for Defendant
BY: BRIAN E. MIDDLEBROOK
-and-
DORSEY & WHITNEY LLP
BY: WILLIAM G. PRIMPS

(Case called)

THE COURT: Good afternoon. So we're here to discuss defendant's motion to dismiss and plaintiffs' motion to strike. I have a sense of where I'm going to come out, but I'm happy to hear anything you'd like to add to your briefs today.

I think I'll hear from defendants first since it's your motion.

MR. MIDDLEBROOK: Thank you, your Honor. I think it's worth starting with a very brief history of the two entities involved here.

THE COURT: Sure. Just speak into the microphone. Thank you.

MR. MIDDLEBROOK: The New York Cosmos is one of the most storied professional soccer teams in history with the likes of Pele playing for them in the seventies and eighties. In the mid-1980s, the professional league that they were affiliated with disbanded and the team ceased playing up until around 2010 when new management took place.

Under new management, the contract negotiations began with Mr. Cantona, the plaintiff in this matter. The idea here for the New York Cosmos was to affiliate themselves under this basically an appearance contract with Mr. Cantona in developing and redeveloping and reestablishing the New York Cosmos as a professional soccer team.

Mr. Cantona is probably one the best soccer players in

history. That being said, he comes with what I believe plaintiff admitted to being a colorful past. There were several incidents. One that primarily comes to mind that was footnoted in the defendant's motion is the kung fu kick. This idea of having a colorful past and Mr. Cantona's potential for such conduct was of paramount importance in the drafting of this consulting agreement. That was one of the primary reasons for the inclusion of a morals clause which left to the Cosmos' discretion if in their reasonable opinion Mr. Cantona's conduct brought the Cosmos, their brand, or Mr. Cantona into material disrepute.

With that history in mind, it's of utmost importance to bring to the Court's attention that what I think plaintiff repeatedly clouds the issues with and that is this reference to a failure to timely make payments.

THE COURT: Why is that clouding the issue?

MR. MIDDLEBROOK: Because those issues, when they occurred -- and the issue was brought to the Cosmos' attention by letters on January 14 of 2014 and February 14 of 2014. In those letters they specifically stated, that is, Cantona's representatives, that they wish to discuss his role with the club and that they were making a request for payments. At no time was this agreement terminated due to a breach. There was no termination.

Under the election of remedies doctrine and a long

line of cases, but primary *ESPN v. Office of Commissioner*, which plaintiff similarly relies upon, once the remedy is elected, and then in that instance the remedy was to continue performance with the option to later sue for a breach limited to the breaches brought to the Cosmos's attention, untimely payments primarily --

THE COURT: Why is it clear that he elected that remedy?

MR. MIDDLEBROOK: Because at no time did he terminate the agreement. And the agreement was very specific in how it would be terminated. There would have had to have been notice, an opportunity to cure. Mr. Cantona would have had to provide a release.

THE COURT: But even if he didn't terminate the agreement, why isn't there at least a question of fact as to whether as of March of 2014, the Cosmos's failure to pay him for more than six months constituted a material breach that would excuse his obligation under the morals clause or just pursuant to contract law?

MR. MIDDLEBROOK: Several reasons.

One, the obligation per the terms of the contract were to put the Cosmos on notice within 30 days of the alleged breach. He failed to do that.

No. 2, if it was his position that the Cosmos were in breach and he intended to terminate, the agreement required for

him to terminate the agreement in accordance with its terms.

Three, at the point that Mr. Cantona was terminated due to a breach of the morals clause, full payment up to the termination date, and that is a defined term in the contract, was made, approximately $450,000. Any alleged damages arising from these purported breaches would have been satisfied and were satisfied with that payment.

So the Court is really only left with a determination of whether the termination under the morals clause was appropriate and that is essentially admitted in the complaint. Paragraph 28 of the complaint specifically acknowledges receipt of full payment up to the termination date.

THE COURT: Right. But, first of all, he was paid afterwards, right? There was at least a six-month period where he wasn't paid, correct?

MR. MIDDLEBROOK: In that six months, he opted to continue performance under the terms of the agreement. The agreement didn't cease to exist merely because a lawyer letter was sent to the Cosmos saying, hey, I want to discuss your role and I want to discuss these payments that were due. The letter in February 2014 also says that this needs to be addressed within the next 15 days. Then there was complete silence up until Mr. Cantona punched an individual in the face outside of a London pub on March 12 of 2014.

The parties were still performing under the terms of

the contract at the time Mr. Cantona was admittedly involved in an altercation outside of that pub. The only relevant question is was the Cosmos's decision to terminate him under the morals clause appropriate. And the answer, particularly under *Nader* and per the instructions of the Second Circuit, is a resounding yes, it was appropriate. *Nader* specifically says the undisputed facts that Nader was arrested and that the arrest generated media attention brings his conduct well within any reasonable interpretation of the morals clause.

THE COURT: But aren't you conflating the ability to terminate with the obligation to provide notice? Show me, for example, a provision in the contract or which provision that requires Cantona to give notice of a breach by the Cosmos, as opposed to how a party can terminate if it wants to terminate. You're going to show me the termination, right, the section on termination?

MR. MIDDLEBROOK: Right.

THE COURT: Okay.

MR. MIDDLEBROOK: Under Section 8.4, particularly 8.4.

THE COURT: 8.4.1, right, talks about in the event Mr. Cantona wishes to terminate this agreement.

MR. MIDDLEBROOK: 8.4.2 specifically says Mr. Cantona -- and I'm cutting to the middle of the sentence; I can read it in its entirety -- Mr. Cantona gives New York Cosmos prior written notice of such event or condition within

30 days of the occurrence of the event or other condition which would otherwise constitute good reason and such event or condition is not corrected by the New York Cosmos within 30 days notice.

MR. COMPO: 8.3 is what you want to look at, Judge.

THE COURT: Just let me go back for a second. You concede then, as I understand you, that the Cosmos's failure to pay him for the six-month period constituted a breach of the agreement on their part; is that right?

MR. MIDDLEBROOK: It was potentially a breach, but it was Cantona's obligation to notify of that breach. And if you read the letters that were sent in January and February 2014, they wish to discuss it and presumably were providing the Cosmos with an opportunity to remedy that situation, which is why the letter exclusively discussed how we can quote/unquote respect the agreement. There was never a discussion or a statement by Cantona or his representatives that they wished to terminate the agreement and they did not. The agreement was still in full force and effect at the time of Mr. Cantona's incident.

THE COURT: Isn't there a difference between providing notice if you seek to terminate as opposed to preserving a breach?

MR. MIDDLEBROOK: No, your Honor. The issue as identified as black letter law in the *ESPN* case is that once

the nonbreaching party elects its remedy, it is bound by that election. It cannot later sue for breach, for the purported breach that it did not terminate the contract for.

THE COURT: So again let's go back to the election of remedies. Your position is that he elected that remedy in the letters from the French attorney, that that was the election, or by just simply by failing to terminate, he elected his remedy; is that your position?

MR. MIDDLEBROOK: That there are only two options -- termination or continued performance. The notices sent by Cantona did not terminate the agreement. They contemplate and specifically said they were continuing performance. It was an explicit representation of the election. There was nothing vague about the letter sent in February of 2014. It was attached to plaintiffs' complaint. They wish to confer on his roles and his duties, and they wish to address the outstanding payments.

Just by virtue of wishing to discuss his continued role with the club, one can derive their intention to continue performing. That's a distinctly different position than as a result of your failure to pay, this agreement is terminated. So we're left with a situation where the parties were obligated to continue performance in accordance with the terms of the agreement.

THE COURT: Right. And the Cosmos were in breach, the

Cosmos were in breach because they hadn't paid him, right, for six months; isn't that your position? You've got to decide one way or the other. Either they were in breach and he didn't terminate in spite of that breach. That's your position, as I understand it.

MR. MIDDLEBROOK: And what I'm saying is that the issue with Cantona's election is clear. The fact that any notice was sent after the 30-day requirement imposed by the agreement calls into question whether or not the notice of that breach was successfully performed. If you are to operate under the assumption that the notice was appropriate and that there was a failure to pay, then the Cosmos breached at that moment. But this idea that there was a continuing breach I can't necessarily agree with.

The point is that the parties were obligated to continue performing and at the moment that Mr. Cantona was involved in the confrontation outside of a London pub, he was in breach of the morals clause.

The key factor to consider, your Honor, and that's why I started with the history of these entities, Cantona's behavior was of paramount importance. He entered into a consulting agreement for the purpose of serving as the face of this professional team looking to get back into the world of professional soccer. He then got into a physical altercation with an individual outside of a pub with an unknown female and

was issued a warning, of sorts, after being arrested.

Now, plaintiff takes issue with the use of the term arrest. You know, Mr. Cantona was taken into custody and by definition under New York law was arrested. This happened in London. So whatever semantics plaintiff is engaging in, it's irrelevant and, frankly, the arrest per se is irrelevant. The uncontested fact and what is acknowledged by Cantona is that he was involved in an altercation.

It is in accordance with *Nader* an issue of law for this Court to decide and one that is absolutely fact that once he was involved in this altercation, the Cosmos had every right to terminate him for bringing their brand and their company into material disrepute.

The publications that are the source of a motion to strike and, again, as I'm sure we'll get into, they were not presented to the Court for purposes of the truth of their substance. It was merely to bring to the Court's attention the fact and the request that the Court take judicial notice of the fact that this occurrence was publicized across the globe, often in conjunction with the New York Cosmos and Mr. Cantona's role as director of soccer.

Under *Nader* and the cases defendant relies upon, they had the discretionary authority to terminate the agreement at that time. They made payment for all amounts due up to the date of termination, rendering moot any issue with respect to

unpaid amounts due; and the contract was terminated.

THE COURT: What about the time period between when the French counsel sent the second letter to the Cosmos requesting that the team clarify its intention and the incident? It's about a month. And, as alleged, and we're assuming the facts in the complaint as alleged to be true, that during that approximate one-month period, the Cosmos continued to breach their obligation under the agreement because the failure to pay was continuous. Am I right about that?

MR. MIDDLEBROOK: No, in that this idea of a continuing breach is -- I'll go back to the *ESPN* case and what the law states. The plaintiff, the obligation was on Cantona to put the defendant on notice of a breach. Once Cantona did so, if that is how the February letter is construed, his options with respect to his remedy for pursuing that breach were limited to a lawsuit for the damages specifically resulting from the breach. He could no longer terminate the agreement based upon that alleged breach of, in this instance, nonpayment.

THE COURT: So you're saying that if after that letter was sent, the Cosmos continued for a year or two years or numerous years not to pay him, that at no time could he say that they had breached the agreement; is that your position?

MR. MIDDLEBROOK: No. My position is if there came a point in time where the Cosmos breached the agreement and

Cantona put them on notice of his intention to terminate the agreement for that breach, then at that point per the agreement Cantona was obligated to provide the notice, the opportunity to cure, a release that was satisfactory to the Cosmos, which would result in approximately 55-day potential span of time for the parties to continue addressing the issue.

There was a very specific and defined set of occurrences in the event that Cantona identified a breach and sought to terminate the agreement. None of those occurred and, in fact, there was a specific intention to continue performing.

So what's being conflated here is this idea that plaintiff, that Mr. Cantona somehow was permitted to act in any way he saw fit because of notice provided to the Cosmos of a failure to make a payment. That is an entirely incorrect reading of the *ESPN* case and black letter law on the election of remedies.

He made a choice -- continue performing under the terms of the agreement. It doesn't matter at that point what the Cosmos did. He determined how he would proceed with respect to the Cosmos's actions and performance under the agreement. Once he opted to do so, he had to continue acting in accordance with the terms of that agreement. And once he was involved in an altercation which he admitted to being engaged in, he was in breach of that agreement, a breach which could not be cured under the terms of the morals clause.

THE COURT: Okay. All right. Thank you. I'm happy to hear you out if there's additional arguments you'd like to make.

MR. MIDDLEBROOK: The arguments with respect to each of the remaining claims, they're fully detailed in the motion papers, your Honor.

THE COURT: Yes, and I've reviewed them.

MR. MIDDLEBROOK: Okay. I mean I think it's worth noting with respect to the claim for breach of implied covenant of good faith and fair dealing, the claim for unjust enrichment, those are entirely duplicative of the breach of contract claims. There's also extensive case law, *RJ Capital v. Lexington Capital*, *Beth Israel Medical Center v. Horizon Blue Cross and Blue Shield*, as well as many other cases the defendant relies on, establishing where there is a contract between the parties, these theories and quasi-contract based on the same set of facts and resulting from the same alleged damages cannot stand.

Similarly, with respect to the third party beneficiary claims, the case law is very clear. For example, *Fourth Ocean Putnam Corporation v. Interstate Wrecking Company*, the third-party beneficiaries have no right to enforce a contract where there is an intended beneficiary who does benefit from the contract and in this case that is Cantona.

THE COURT: Weren't they also intended beneficiaries?

MR. MIDDLEBROOK: They were intended third party beneficiaries. That's a distinctly different notion from the ability to enforce the contract. And the case law is clear that where you are a third-party beneficiary, if the contract does not explicitly grant you that right, which this contract does not, then the only way that a third party beneficiary has standing to bring a claim for breach is if there's no other entity that benefits from the contract. In this case, clearly, Mr. Cantona stood to collect almost $4 million in accordance with its terms.

Finally, your Honor, with respect to the labor law cases, the Labor Law Article 6 claims, the defendant is moving to dismiss those claims in their entirety as well.

Mr. Cantona, the third-party beneficiaries, they were not employees under the contract.

THE COURT: Isn't that a factual decision, a determination that needs to be made when there's a factual record in this case whether he was an employee?

MR. MIDDLEBROOK: Under *Bynog v. Cipriani Group*, those are issues of law as well.

It's also critical to note, your Honor, that even if Mr. Cantona was deemed to be an employee, he would be deemed to be at the executive level for which Section 193 doesn't apply. And that also presumes that at some point in the complaint, Cantona specifies what specific claims he's making, which he

does not. And in his opposition he relies upon the definition section of Article 6 of the Labor Law.

And finally, your Honor, I would just say with respect to the motion to strike, we already touched upon it, but the articles that were presented and attached were presented exclusively seeking that the Court take judicial notice of the fact that they were publicized. This is not a situation where -- and the case law cited by plaintiff exclusively contemplates situations where the actual substance of the publications is being relied upon.

Here, it is strictly for the existence of this claim on a global scale and the implications of Mr. Cantona's conduct as it impacted the Cosmos's brand. And they were within their rights to terminate Mr. Cantona. And it's important to note that the agreement specifically contemplated and used the term, if within the Cosmos's reasonable opinion, Cantona's conduct brought the Cosmos or their brand into material disrepute, he could be terminated.

THE COURT: Isn't that a factual question too?

MR. MIDDLEBROOK: Not at all, your Honor, and that's why their reliance on *Nader* and the line of cases from the Second Circuit is of critical importance. These are issues of law. *Nader* was determined at the summary judgment stage simply because parties didn't file a motion to dismiss. But the Court was explicitly clear that it is an issue of law and that the

undisputed fact that the individual was arrested and that the arrest generated media attention brings his conduct well within any reasonable interpretation of the morals clause.

THE COURT: Thank you very much.

MR. MIDDLEBROOK: Thank you.

THE COURT: Would you like to be heard?

MR. COMPO: I would, your Honor, I would.

Judge, 12(b)(6) motions, they accept the factual allegations set forth in the complaint as true and draw all reasonable inferences. Although well argued, I believe all the issues are for summary judgment here. And it's important to note that there are significant factual allegations in the complaint that are also re-alleged in the causes of action. Specifically, also, there is allegations that there were two notices. There is one notice attached to the complaint and there is another that still has to be proven and also what the contents of that notice was.

This idea of election of remedies, I feel the Court was pushing towards this idea that there is a cutoff and there is a point where, hey, there's got to be a clear election here and not just a good faith duty to try to negotiate terms because this is exactly what it was. This was Mr. Cantona reaching out and trying to renegotiate or negotiate an understanding of the contract.

It doesn't mean that he waived his election. In fact,

the doctrine of election of remedies typically only applies when the nonbreaching party continued to receive benefits under the contract. If you read the allegations along with the exhibits of the complaint, what it says is that not only was he deprived of his payment, which is material breach under the agreement and under the law, but he was also replaced as director.

So it's unclear what benefit Mr. Cantona had at this point. He wasn't getting paid. He didn't have the position that he was given under the contract. And there was no response by Cosmos at all. So how could, under their argument, how could Mr. Cantona presumably give them a release that they were comfortable with if they weren't communicating with him.

And, Judge, I would like for you to read the contract because there needs to be an understanding of this termination clause which I'm surprised hasn't been brought up before. But there is a termination clause which starts at eight and it starts at 8.1, 8.11, 8.12, which are not applicable here. And then there's 8.13 which says, the termination of this agreement by New York Cosmos for cause. Okay, so we have that. And then we move to 2 which also alleges specifically conduct which in the reasonable opinion of New York Cosmos brings Mr. Cantona, the New York Cosmos, or any subsidiary or affiliate or its brand into material disrepute.

Now, this is a question of reasonableness and they

have it in there. It says, in the reasonable opinion of New York Cosmos. What does that mean? Does that mean if Mr. Cantona got a parking ticket he would fall under the reasonable opinion of New York Cosmos material disrepute?

You have to look at *Nader* in the context of how it was decided. *Nader*, ABC actually did not take action against Nader for his first arrest, which was drunken driving and resisting arrest. There was no action on that. So clearly there's a level at which a party may not take action and it may not be reasonable. I don't know what that is, but it certainly is a question of fact. Later, Nader got a second shot at it and he failed miserably. He got arrested for cocaine distribution, which is a felony under that specific contract.

Now, if you go back to *Mendenhall*, which is a case that I cited in my brief, and you look at *Mendenhall*, it was a North Carolina federal court was applying New York law. And it said in *Mendenhall* that, you know, there is an obligation underlying the contract to act in good faith and fair dealing. This means that a party to the contract can't act irrationally or unreasonably. And they went on to deny judgment on the pleadings because of that specific language.

Now, counsel points out that this was an idea where *Mendenhall* just basically made tweets out on the internet. Well, we're dealing with and what counsel puts forth in their affidavits as four internet articles that were put out on the

internet. Now, we have to look at that in the context of what's being put out there. We're in a different world here, your Honor. We're in a world where anything can be put out on the internet and whether it's true or not, it's out there. So there's an inquiry here. In this era of internet era, is this something that rises to the level that is material disrepute and whether the Cosmos acted unreasonably by terminating Mr. Cantona.

Now, let's look at the context in which all this happens. He hasn't gotten paid for six months. He filed one notice, no response. Filed another notice, no response. He gets taken out as the director of soccer organization, which is in the letter and the Court can take that into consideration because it's attached as an exhibit. So all these, although counsel says they're irrelevant, they're actually very relevant because my client alleges pretext, pretext in that not just a conclusion of law, but we go on to explain that they didn't want to pay him the 4 percent equity interest in the Cosmos. Now, that's an issue of fact that we have to discover because looking at all this conduct in its context raises not only one eyebrow but two.

And, Judge, just for the termination issue, 8.3, which is what they rely on, specifically states the New York Cosmos may additionally terminate this agreement on not less than 30 days written notice of termination to Mr. Cantona, the New York

Cosmos. Reading this in its entirety, upon such termination, reverting back to that first sentence, termination, referring to the termination in the first sentence, or any termination of this agreement by Mr. Cantona for good reason defined below, and the receipt of New York Cosmos general release form in substance reasonably satisfactory -- and again, your Honor, we did plead that all conditions have been met, have been waived or have occurred -- that becomes effective and irrevocable no later than 55 days following the termination date the New York Cosmos shall make and there's the remedy there.

But, Judge, we're reading this in context here it says the New York Cosmos may additionally terminate this agreement on not less than 30 days written notice, not Mr. Cantona. So we go back to that letter we read it in context. On January 14, I wrote you about my client's worries regarding the nonrespected consulting agreement. It seems I haven't had an answer. Furthermore, my client let me know that the payments for January haven't been made. So they haven't paid September. They're informing them of another breach for January. And such a situation is not acceptable and with no delay, clarify your intentions concerning the role. Your intentions, what are your intentions? Are you going to terminate this agreement? What are you doing? I believe these are issues of material fact, your Honor.

In fact, concerning Eric's visa, could you please

confirm that the club as an employer took necessary steps to obtain on time its renewal. So now they're concerned about another thing that's under the contract, a visa.

THE COURT: Let's just talk about defendant's argument regarding election of remedies for a minute. In your view, at what point did Mr. Cantona elect his remedy for the Cosmos' breach? Did he do it in February 14 in the letter where he held back on termination? Did he do it at some point between February 14 and March 12? Did he do it on March 12, or did he do it when he filed this lawsuit?

MR. COMPO: Well, your Honor, it's our position that Mr. Cantona performed to the agreement up until the first notice was sent. And at that point when he discovered --

THE COURT: I'm sorry, when you say notice, are you referring to --

MR. COMPO: The January.

THE COURT: -- the letter from his attorney.

MR. COMPO: Yes, the letter that references the January 14 letter. That was notice of their nonpayment. And again, your Honor, I cited *Hallinan* at 519 F.Supp.2d at 352 where a court finds that a breach claim is barred by the doctrine of elections of remedies, the claimant has not only continued to perform under the contract, but receives a benefit under the contract. The doctrine of election of remedies only applies when the nonbreaching party continues to receive a

benefit under the contract.

So the question is and I think it's really what were the intentions of the parties when all this was going on. I think the termination clause is unclear because we have a beginning sentence that says the New York Cosmos may additionally terminate this agreement on not less than 30 days notice.

Does the fact that Mr. Cantona doesn't send the notice within 30 days, does he basically waive his breach of contract? I don't think that's black letter law, your Honor. I think when there's a nonpayment under a contract, which is the benefit you're receiving, you're really receiving the monetary benefit of a contract and the designation as a director, and when all that is taken away and you're not receiving any benefit, are you really, because you didn't give that 30 days notice, but you did in fact give notice, are you waiving that breach of contract? I just don't see it, your Honor.

I see there are several questions that need to be answered here. I think they're all issues of material fact. I think you have to look at the reasonableness, the underlying motivation behind all this. And I think what will come to light is that they did not want to pay him his 4 percent equity interest. And when the inquiry began into that 4 percent equity interest, that's when all benefits ceased to be given to Mr. Cantona.

And it's interesting to note that the incident that occurred -- and there is a factual dispute as to what occurred in London. And we allege that it did occur in London and there are different laws in London than there are in New York. In fact, paparazzi have to stay back a certain distance from people that are in the public realm.

THE COURT: Does it matter whether the articles were true or not? Can't an article create a negative impression to the public even if they're not true?

MR. COMPO: Well, to the public, what negative impression and what was published? We have four articles here that were online that our arguments are that this is not something that should be taken judicial notice of.

THE COURT: Can't I take judicial notice of the fact that they were published as opposed to the truth of the contents of the articles?

MR. COMPO: Well, you can, if it's a reliable source. And courts have done that, but it was limited circumstances. It's when there was undisputed facts. And something like the stock market crash, they took a publication of a well-known newspaper and the court took judicial notice of that. We're talking about internet articles that are I don't know who they're from. I've never heard of the Guardian. But apparently these were published. And, Judge, if these come in, why not allow us to come in and show what was published later,

how this really doesn't affect anything.

They talk about this kung fu kick as though it happened yesterday. This was 25 years ago. And in this 25-year span, as counsel said, Mr. Cantona is one of the best soccer players to ever live.

THE COURT: I think counsel just mentioned that as background regarding why there was a morals clause in the contract to begin with. That's how I understood his argument. But in any event.

MR. COMPO: If you look at the contract, there is an opportunity to cure a violation of the morals clause. It's in the contract and it says --

THE COURT: If I agree with you ultimately that you have alleged plausibly a material breach by the Cosmos, do I even need to reach the question of whether that March incident violated the morals clause?

MR. COMPO: Well.

THE COURT: At this stage, on a motion to dismiss.

MR. COMPO: Rule 8 allows us to plead in the alternative and, essentially, the breach of contract fails, then our allegations are under violation of the good faith and fair dealing implied under case law. Again, same with unjust enrichment. These are pleadings in the alternative. And they can be dismissed at some point when the Court determines that there is in fact a contract. At this point, there's no

determination of that. So all the pleadings --

THE COURT: I don't think there's a dispute as to the validity of the contract, is there?

MR. COMPO: Well, the Court hasn't made a determination yet. I think there's a dispute as to the --

THE COURT: The interpretation of certain provisions, for sure, but I haven't heard that there's a dispute from either side that this was a valid contract.

MR. COMPO: No.

THE COURT: In any event, just why don't you complete your argument.

MR. COMPO: I believe that it's all an integral part of this because this pretext is important because we're looking at the reasonableness of their actions in the total context. So do I believe that there's a breach of contract? There can also be another substantive claim for breach.

THE COURT: That's not what I was asking. I was asking if I agree with you that you have plausibly alleged a material breach by the Cosmos, can I deny the motion to dismiss even without reaching the question of whether the March 2014 incident violated the morals clause. That was my question, which is a very different question.

MR. COMPO: I think you have to, your Honor. I think it's a question of fact. I think it's not a question of law because under *Nader*, there was an instance that under the

factual allegations that NBC did not in fact terminate him for an incident. And then you have the *Mendenhall* case which basically says that yes, there is something that comes out, there is an implied covenant of good faith and fair dealing as it applies to this morals clause. I think it ultimately is a summary judgment issue or even an issue for the jury.

THE COURT: Okay. Thank you.

Would you like to respond?

MR. MIDDLEBROOK: Briefly, your Honor. Starting with the question presented last first, the idea that if the Court made a determination that there was a material breach.

THE COURT: That it was plausibly alleged. I'm not making any determinations, just that one was plausibly alleged. But, yes, please continue.

MR. MIDDLEBROOK: The idea -- there is no damage sustained from this plausible potential breach. As acknowledged in the complaint, plaintiff has been paid in full up to the termination date. So even if the Court were to continue, you were to allow the case to continue, there's no damages to be sustained from this alleged breach.

So the answer to the question on the law is absolutely. Under the election of remedies, plaintiff made a clear decision. And when counsel states was this just going to go on and on.

THE COURT: When do you think -- I asked counsel about

when that decision was made. Was it made in the January letter from the French counsel, was it made in the February letter? When was that election made in your view?

MR. MIDDLEBROOK: Every day that Cantona did not terminate the agreement, he elected his remedy. Every single day he chose to continue his performance under the terms of that agreement and to potentially pursue a claim for breach at a later date, he had to continue his performance in accordance with its terms. Otherwise, he's not electing a remedy. He's taking advantage of every potential remedy out there.

And the courts have specifically said, the Second Circuit has made abundantly clear, once a party elects to continue the contract, it can never thereafter elect to terminate the contract based on that breach. That is taken from the *ESPN v. Office of Commissioner* case citing black letter law.

This is merely a question of whether or not the termination was appropriate under the morals clause, which it absolutely was, which *Nader* makes abundantly clear. And it's worth noting, your Honor, this question of does a reasonable opinion require a judicial or an inquiry by a jury, the Cosmos paid over $4 million, potentially, to secure Mr. Cantona as the face of the company. In doing so, they sought to protect themselves from the potential that Mr. Cantona would conduct himself in a way that damaged the Cosmos. He did so, and so

they terminated the agreement, but that is not an issue for a jury. Otherwise, that renders every potential morals clause meaningless. If there's a morals clause and it's violated, then we need to get the case to a jury. It defeats the purpose. And the case law, the Second Circuit has said these are absolutely acceptable clauses and they are to be given respect within the four corners of these agreements.

The specific morals clause at issue in *Nader* said if in the opinion of ABC, artist shall commit any act or do anything which might intend to bring the artist into public disrepute, contempt, scandal, or ridicule, or which may tend to reflect unfavorably on ABC, any sponsor of a program, any such sponsor's advertising agency, any stations broadcasting or scheduled to broadcast a program or any license of ABC, or to injure the success of any use of the series or any program, ABC may upon written notice to artist immediately terminate the term and the artist's appointment.

These are by their nature discretionary termination provisions designed to protect the image of the companies entering into these agreements. The Second Circuit has said it is an issue of law for the court to decide and said specifically there is no reasonable interpretation other than the fact that termination was appropriate where a person gets arrested and they were to be the face of that entity.

The idea that discovery is necessary so that it could

possibly determine what future publications there may have been does not take the punch out of the face of the paparazzi. Mr. Cantona acknowledges that he was involved in a physical altercation with paparazzi.

THE COURT: It's just argument. You can wait, okay.

MR. MIDDLEBROOK: He acknowledges there was an altercation, that he was cautioned, that there are photographs taken of him getting into the back of a police car. The damage was done the second the story was publicized, particularly publicized referencing Cantona as director of the New York Cosmos.

So, you know, again, it was designed to be discretionary. The Second Circuit has upheld these discretionary provisions. They were bargained for at arm's length with both parties represented by counsel. There was a tremendous financial benefit to be gained by Mr. Cantona and his associates in entering into this agreement. The Cosmos had a right to protect itself and it tried to do so.

Now, the idea that every allegation in this complaint must be given the benefit of the doubt and accepted as true is not accurate, your Honor. The allegations that prompt this inference --

THE COURT: We're making a determination at this stage, at this very early stage of this litigation, as to whether those allegations are plausible under *Iqbal* and

Twombly, correct?

MR. MIDDLEBROOK: Correct.

THE COURT: Okay. Please continue.

MR. MIDDLEBROOK: *Burgess v. Harris Beach PLLC*, 346 F. App'x 658, Second Circuit, where the facts, quote/unquote, as alleged are really designed to cause the court to make various inferences such as pretext where it is a derivative of fact. Those are not entitled to the benefit of an assumption of truthfulness. They're to be removed from the analysis, and they don't require further factual development when contemplating a motion to dismiss.

And that's why when I began speaking your Honor, I made a reference to this idea that there are a significant number of allegations and claims here that truly just cloud the only relevant issue. The only relevant inquiry is whether or not the termination of Cantona under that morals clause was appropriate and it was, as I've now stated on several occasions.

With respect to *Mendenhall*, your Honor, it's fully addressed in the reply papers. I will only say because it's worth bringing to light, *Mendenhall* did not establish that the implied covenant of good faith and fair dealing was a viable claim. It was used as a standard of review in evaluating whether the defendant was reasonable in the use of discretion. That inquiry was based on a football player's tweeting

controversial statements.

This has nothing to do with that scenario. There was an altercation with police involvement, exactly what occurred before the Second Circuit when the termination pursuant to a morals clause was held valid. So the heavy reliance on *Mendenhall* is misplaced under the facts of this case.

THE COURT: Why don't you just sum up.

MR. MIDDLEBROOK: Your Honor, the morals clause was specifically included in this agreement with Mr. Cantona to protect the New York Cosmos from very particular behavior in light of Mr. Cantona's demonstrated and admitted past, colorful past I believe is what he represented in the complaint. When Cantona opted not to terminate the agreement and instead to continue performance, he was obligated to perform in accordance with the terms of this agreement. He did not do so, and he was terminated pursuant to the morals clause.

The remaining causes of action, as fully outlined in the briefs, are duplicative and fail as a result and as I've stated previously. Thank you.

THE COURT: Thank you very much.

Mr. Compo, one minute if you'd like it.

MR. COMPO: Yes, Judge. Under New York law, election of remedies is an affirmative defense. This is *Lumber Mutual Casualty Insurance of New York*, 176 Misc. 703, 28 N.Y.S.2d 506. Furthermore, an election of remedies requires an affirmative

action of some kind. *Hallinan v. Republic Bank and Trust Company*, 519 F.Supp.2d 340 (S.D.N.Y. 2007). Here, Cantona never communicated expressly or by implication that he would forego the breach.

Good faith attempts to realize contractual benefits while negotiating with a counterparty, rather than immediately filing suit, does not constitute an election of remedies. This is *Seven-Up Bottling Company v. PepsiCo,* 686 F.Supp. 1015 (S.D.N.Y. 1988). And the court went on to say a party's reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligations under the contract do not necessarily constitute a waiver of the innocent party's rights in the future. And they were citing *S.D. Hicks & Son Co. v. J.T. Baker Chem Co.*, 307 F.2d 750 (2d Cir. 1962).

So, again, election of remedies is an affirmative defense. If Mr. Cantona did not make an election of remedies and there was a material breach of the contract, the question is whether Mr. Cantona had to continue to perform under the agreement, which would bind him to the morals clause. And if in fact he had to perform under there, was the morals clause reasonable.

So there's a certain trace we have to follow here. We have to look at the context under which all this happened. We have to look at the election of remedies issue and whether

Mr. Cantona actually chose an election of remedy, and then whether that morals clause applied to him, and if it did, was it reasonable. So there's a set of inquiries we have to go through here.

THE COURT: All right. Thank you very much.

Why don't we adjourn briefly, take a short break, and then we'll resume. Thank you.

(Recess)

THE COURT: I'm ready to rule on the motions.

In short, I'm going to deny plaintiffs' motion to strike. I'm also going to deny defendant's motion to dismiss, except as it relates to plaintiffs' unjust enrichment claims. I don't know whether plaintiff will ultimately be able to prove their claims, but their complaint does allege facts giving rise to a plausible inference that the Cosmos breached their contract with Mr. Cantona. No more is required of plaintiffs at this time.

Why don't I begin with the motion to strike and then I'll move on.

First, I'm denying plaintiffs' motion to strike the four news articles describing Mr. Cantona's encounter with a photographer in March of 2014 because it's well established in this district that courts may take judicial notice of news articles for the fact of their publication without converting a motion to dismiss into a motion for summary judgment. See, for

example, the *Pension Committee of University of Montreal* case and the *In re Merrill Lynch Research Reports* case.

Plaintiffs argue that the Cosmos rely on the articles for their truth, but defendant clearly states that it seeks judicial notice solely for the fact that the articles were published and available online to a global audience. The Cosmos also correctly notes that whether the articles create any "negative impressions" does not depend on whether or not they are true.

I agree and I will not strike the articles, but they will be made part of the record solely as to the fact that they were published and not for the truth of their contents at this stage. In any event, for the reasons that follow, I need not rely on the articles for the purpose of deciding the Cosmos' motion to dismiss.

I'll now turn to that motion. Let's start with plaintiffs' breach of contract claim. There's no dispute that Section 11.9 of the consulting agreement provides that it is to be governed by New York law. The elements of a breach of contract claim under New York law are well established, requiring the formation of a contract, performance by the plaintiff, failure of the defendant to perform, and damages.

New York law excuses a party's performance under a contract when a counterparty has substantially failed to perform its side of the bargain or, synonymously, where that

party has committed a material breach. That's a quote from the *Merrill Lynch v. Allegheny Energy* case from Second Circuit, 500 F.3d at 186. Whether a party has committed a material breach is ordinarily a question of fact to be determined after analyzing a variety of different factors. See generally the *Hadden* case from the New York Court of Appeals, 34 N.Y.2d 96.

Here there's at least a factual question as to whether the Cosmos' failure to pay Mr. Cantona from September 2013 through March 2014 amounts to a material breach of the agreement that would excuse Mr. Cantona from his contractual obligations. If Mr. Cantona was excused from performance, he was under no obligation to comply with the morals clause in the agreement for the six-plus months during which he was not paid.

Accordingly, if the Cosmos were in material breach of the agreement prior to the March 12 incident involving Mr. Cantona and the paparazzi, the Court need not consider whether that incident brought anyone into material disrepute under Section 8.1.3(ii)(D) of the agreement. Whether Mr. Cantona violated that or any other section of the agreement matters only if Mr. Cantona was obligated to perform his contractual obligations. Plaintiffs plausibly allege that the Cosmos' failure to pay Mr. Cantona from September 2013 through March 2014 constitutes such a breach.

The Cosmos respond that its failure to pay Mr. Cantona is not a breach as a matter of law because Mr. Cantona elected

not to terminate the agreement when the Cosmos stopped paying him in September 2013. This argument improperly conflates a breach of the agreement with its termination. That Mr. Cantona had not terminated the agreement as of March 12, 2014, only underscores that the Cosmos were under a continuing obligation to pay him as of that date. In fact, the Cosmos acknowledge in their opening brief that plaintiffs have alleged facts "that would constitute 'good reason'" to terminate the agreement, which essentially concedes that the team failed to perform its contractual obligations.

The Cosmos' argument that Mr. Cantona waived or abandoned his ability to terminate the agreement does not alter this conclusion. Nothing in the agreement suggests that plaintiffs would forego a claim for breach of contract by choosing not to terminate the entire agreement.

The Cosmos' reliance on the doctrine of election of remedies also fails at this stage. The complaint does not allege that Mr. Cantona had decided not to terminate the agreement before March 12, 2014. Unlike in the *ESPN* case, here there's a factual question in the Court's view as to whether Mr. Cantona elected not to terminate his contract. Indeed, in the February 14, 2014 letter from Mr. Cantona's French attorney, which is attached to the complaint and incorporated therein, his lawyer noted that the situation was unacceptable and that he may have to consider all necessary actions. At

that point, plaintiffs allege that they were not benefiting from the contract in any way.

Finally, the Court also disagrees with the Cosmos' argument that Olympica Sports Management and the Joel Cantona Organisation are third party beneficiaries that lack standing to enforce the agreement. Section 11.2 of the agreement clearly indicates that the parties intended the Cosmos to pay Olympica and Joel Cantona and that they would receive the benefit of Mr. Cantona's performance. As such, they are "intended beneficiaries" who may enforce a contract under the Restatement (Second) of Contract Section 302, which the New York Court of Appeals adopted in the *Fourth Ocean Putnam Corp.* case, 66 N.Y.2d 44-45.

So for these reasons, I'm denying defendant's motion to dismiss plaintiffs' breach of contract claim.

I'm also denying the Cosmos' motion to dismiss plaintiffs' claim for breach of the implied covenant of good faith and fair dealing.

The implied covenant works only to ensure that a party with whom discretion is vested does not act arbitrarily or irrationally or with bad faith in fact. That's from the *Dalton* case in the New York Court of Appeals, 87 N.Y.2d 397.

Plaintiffs plausibly allege bad faith in fact because they claim the Cosmos' claim of termination for cause was merely a pretext to cancel the agreement. See paragraph 31 of

the complaint. If the Cosmos sought to terminate the agreement to avoid having to give Mr. Cantona a 4 percent equity interest in the team rather than out of a genuine belief that Mr. Cantona had violated the morals clause of the agreement, plaintiffs may state a claim for breach of the implied covenant. The fact that the Cosmos terminated the agreement after not paying Mr. Cantona for six-plus months makes plaintiffs' claim of pretext plausible.

And plaintiffs' implied covenant claim is not duplicative of their breach of contract claim because it hinges on the Cosmos' rationale for terminating the agreement, not whether the March 12, 2014 incident in fact violated the morals clause. Plaintiffs' implied covenant claim therefore focuses on the limits of the Cosmos' discretion in determining whether Mr. Cantona violated the morals clause. Plaintiffs plausibly allege that the Cosmos exceeded those limits.

I'll next turn to Mr. Cantona's claim under Article 6 of New York Labor Law which applies only if Mr. Cantona was an "employee" of the Cosmos, which hinges on "the degree of control exercised by the purported employer over the results produced or the means used to achieve the results." The *Bynog* case from the New York Court of Appeals established five factors for courts to consider when making this determination. See 1 N.Y.3d 198, although these factors are not exhaustive. See *Hart v. Rick's Cabaret* case for a list of additional

factors, 967 F.Supp.2d 923-24.

Although Section 9 of the agreement disclaims any employment relationship between Mr. Cantona and the Cosmos, it is not significant how the parties define the employment relationship. That's from *Hart*, 967 F.Supp.2d at 924. Whether Mr. Cantona was a Cosmos employee under New York law is therefore a question of fact that cannot be resolved based only on the facts alleged in the complaint. This conclusion is underscored by the fact that both plaintiffs and defendant point to different sections of the agreement as supporting their analysis of the *Bynog* factors.

The Cosmos further argues that even if Mr. Cantona was an employee, his Article 6 claim fails because he served in an exempt executive, managerial, or administrative capacity. That, too, is a question of fact that cannot be resolved on a motion to dismiss.

Because plaintiffs plausibly allege Mr. Cantona was an employee of the Cosmos and the facts are not so developed that the Court can determine whether he's exempt, I'm denying defendant's motion to dismiss the Article 6 claim.

Lastly, as to plaintiffs' unjust enrichment claims. As a quasi-contractual claim, a cause of action for unjust enrichment can be maintained only in the absence of an express agreement. That's from the *Beth Israel Medical Center* case, 448 F.3d 587.

Here, the Cosmos do not dispute that the agreement "governs the disputes between the parties in all respects and that it is valid and enforceable." That's from page 11 of their reply brief. Since there's no dispute that the agreement is an enforceable contract, I'm granting the Cosmos' motion as it relates to plaintiffs' unjust enrichment claims.

So to summarize, I'm denying plaintiffs' motion to strike. I'm denying defendant's motion to dismiss, except as it relates to the plaintiffs' claims for unjust enrichment. To avoid any confusion, I am dismissing plaintiffs' third, fifth, and sixth causes of action. But plaintiffs' first, second, and fourth causes of action may proceed.

Of course, it's too early to know whether plaintiffs will be able to satisfy their ultimate burden to prove these claims.

So I'm going to thank the court reporter and we can proceed off the record for scheduling and the like.

MR. MIDDLEBROOK: Your Honor, to the extent necessary for the record, the defendant would note its objection to the ruling.

THE COURT: It is so noted.

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